RESPONSE OF DEFENDANT DETROIT BOARD OF EDUCATION TO PETITION FOR WRIT OF CERTIORARI FILED BY WILLIAM MILLIKEN AND FRANK J. KELLEY

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Dated: June 12, 1972

IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____

WILLIAM G. MILLIKEN, et al,

Petitioners,

vs.

RONALD BRADLEY, et al

Respondents.

RESPONSE OF DEFENDANT DETROIT BOARD OF EDUCATION TO PETITION FOR WRIT OF CERTIORARI FILED BY WILLIAM MILLIKEN AND FRANK J. KELLEY

Defendant DETROIT BOARD OF EDUCATION, pursuant to U.S.S. Ct. Rule 21 (4), in response to the Petition for Writ of Certiorari filed by WILLIAM MILLIKEN and FRANK J. KELLEY, co-defendants herein, in partial support for the aforesaid petition, states as follows:

I.

Respondent DETROIT BOARD OF EDUCATION supports the Petition for Writ of Certiorari and agrees with petitioners MILLIKEN and KELLEY that the order issued by the District Court in this cause on September 27, 1971 was ripe for appeal, and that the action of the U.S. Court of Appeals for the Sixth Circuit in dismissing the appeals of petitioners MILLIKEN and KELLEY and respondent DETROIT BOARD OF EDUCATION was erroneous, for reasons set forth in this respondent's brief to the Court of Appeals, filed cn February 3, 1972, and set forth in the Appendix hereto.

II.

Although petitioners raise and discuss two substantive questions in their petition, respondent DETROIT BOARD OF EDUCATION does not understand them by this petition to ask for review of any issue other than whether the dismissal of the previous appeals by the Court of Appeals was proper. Therefore, it does not appear necessary to state a detailed response to questions II and III as raised by petitioners.

As a matter of record the DETROIT BOARD OF EDUCATION agrees with petitioners insofar as petitioners argue that the record in the trial court does not support a finding of the existence of a dual school system in the Detroit Public Schools or justify any remedy. If it should be found that some kind of remedy is appropriate, insofar as the petitioners argue that as a matter of law any remedy ordered must be restricted to the jurisdiction of the School District of the City of Detroit, and may not involve schools operated by other agencies of the State of Michigan, respondent DETROIT BOARD OF EDUCATION disagrees.

CONCLUSION

While agreeing in part and disagreeing in part with petitioners other contentions, respondent DETROIT BOARD OF EDUCATION supports the Petition for Writ of Certiorari for the purpose of reviewing the dismissal of appeals by the Court of Appeals.

Respectfully submitted

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Dated: June 12, 1972

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NO. _____

RONALD BRADLEY, et al.,

Plaintiffs–Appellants,
Cross-Appellee,

vs.

WILLIAM G. MILLIKEN, et al.,

Defendants-Appellees,
Cross-Appellants,

DETROIT FEDERATION OF TEACHERS, LOCAL 231,
AMERICAN FEDERATION OF TEACHERS, AFL-CIO

Defendant-Intervenor-
Appellee,

and

DENISE MAGDOWSKI, et al.,

Defendants-Intervenor.

Appeal from the United States District Court
for the Eastern District of Michigan
Southern Division

ANSWER OF DEFENDANTS BOARD OF EDUCATION FOR THE CITY OF DETROIT TO MOTION TO DISMISS APPEALS

STATEMENT OF THE ISSUE

Is the order dated November 5, 1971, which incorporates the final findings of fact and conclusions of law that the Defendants Board of Education for the City of Detroit, et al have committed acts amounting to de jure segregation of the Detroit public schools contained in the District Court's Ruling on the Issue of Segregation, and which directs the Board to submit a plan of desegregation and an appealable order?

The Defendants Board of Education contend "yes".

Defendants-Appellees, Cross-Appellants, the Board of Education for the City of Detroit, et al (hereinafter referred to as Board of Education) respectfully moves this Honorable Court to deny the Motion to Dismiss Appeals filed herein by Plaintiffs-Appellants and Cross-Appellees, for the reason that this Honorable Court has jurisdiction of this matter at this time because (1) the order appealed from by the Board of Education is a final order within the meaning of 28 U.S.C. 1291, or in the alternative, (2) is an appealable interlocutory order pursuant to 28 U.S.C. 1292 (a) (1).

In support of their prayer that the Motion to Dismiss should be denied as to their appeal, the Board of Education, et al show the following:

STATEMENT OF PROCEDURAL FACTS

Plaintiffs commenced this litigation filing a complaint on August 18, 1970 against the Board of Education of the City of Detroit, its members and the then Superintendent of Schools, as well as the Governor, Attorney General, State Board of Education and State Superintendent of Public Instruction of the State of Michigan. Plaintiffs challenged the constitutionality of Act 48 of the Public Acts of 1970 of the State of Michigan as it affected certain plans of the Detroit Board of Education, and also alleged that the Detroit Public School System was and is segregated on the basis of race as a result of the official policies and actions of the Board of Education. After making said allegations, the Plaintiffs in two and one-half pages of pleadings asked for certain relief including preliminary injunctions requiring the Board of Education to implement a plan of desegregation known as the "April 7, 1970" plan restraining implementation of the aforementioned Act No. 48 of Michigan Public Acts of 1970, restraining the Board of Education from all further school construction and requesting permanent decrees concerning the above, and enjoining the Board of Education from building schools, approv-

ing policies, curriculum and programs "which are designed to or have the effect of maintaining, perpetuating and supporting racial segregation in the Detroit School System" and ordering Defendant School Board to institute a plan of desegregation.

This case was initially tried on Plaintiffs' motion for preliminary injunction to restrain the enforcement of the aforementioned Act 48 so as to permit the so-called April 7, 1970 plan to be implemented. The trial court ruled that the Plaintiffs were not entitled to a preliminary injunction, did not rule on the constitutionality of Act 48, and granted a motion dismissing the cause as to all of the State Defendants.

This Court, in **Bradley v. Milliken**, 433 F. 2d 897, 989 (6th Cir. 1970), held that the Trial Court did not abuse its discretion in denying the motion for preliminary injunction, but, reversing the trial court in part, held that portions of Act 48 were unconstitutional and that the State Defendants should remain in the suit. By so doing, this Court recognized that at that time it had jurisdiction to hear the appeal, even though the matter was still pending in the lower court and there had not then been a trial on the merits.

Subsequently, the Plaintiffs sought to have the Trial Court direct the Defendant, Detroit Board, to implement the "April 7th" plan prior to trial. The Court did not order implementation of the "April 7th" plan, but, instead, adopted a plan submitted by the Board of Education.

Plaintiffs again appealed to this Court, and again, the Court held that the Trial Court had not abused its discretion in refusing to adopt the April 7, 1970 plan. This Court furthermore remanded with instructions to proceed immediately to a trial on the merits of Plaintiffs' allegations about the Detroit School System. **Bradley v. Milliken**, 438 F. 2d 946 (6th Cir. 1971). Again this Court did not question its jurisdiction to hear the second appeal, even though there had been no trial on the merits, but, instead,

denied Plaintiffs the relief sought on grounds other than jurisdictional.

The trial on the issue of segregation began April 6, 1971 and was concluded on July 22, 1971 after consuming 41 trial days.

On September 27, 1971, the Trial Court issued a "Ruling on Issue of Segregation" which is attached as Appendix A to the Plaintiffs' motion herein.

In that ruling at page 25 (see Appendix A of Plaintiffs' motion), the Court stated with particular finality:

> In conclusion, however, we find that both the State of Michigan and the Detroit Board of Education have committed acts which have been causal factors in the segregated condition of the public schools of the City of Detroit. As we assay the principles essential to a finding of de jure segregation, as outlined in rulings of the United States Supreme Court, they are: . . . "

And at page 34 of the ruling, the Court stated:

> "Having found a de jure segregated public school system in operation in the City of Detroit, our first step, in considering what judicial remedial steps must be taken . . . "

Pursuant to the above ruling, a pre-trial conference was held on Monday, October 4, 1971, the transcript of which has been attached to Plaintiffs' motion herein as Appendix B. As the transcript reveals the entire purport of the pre-trial conference on October 4, 1971 was directed towards a remedy implementing the Court's ruling.

This pre-trial conference concluded with the Court setting a time table for the presentation of proposed implementation

plans. Though counsel for Plaintiffs has suggested that at page 29 of the pre-trial transcript that the then counsel for the Board of Education waived the entering of an order, the Court did enter its order of November 5, 1971, which is attached to Plaintiffs' motion as Appendix C, set forth therein the time table for the presentation of plans, and confirmed that as far as the Trial Court was concerned, its findings of fact and conclusions of law on the issue of segregation had been made and were final.[1] Furthermore, in their motion now before this Court, the Plaintiffs at page 6 concede that the Defendants had the right to insist on an order being entered.

It is also noted that the Trial Court had previously issued an injunction prohibiting the Defendant School Board from constructing any new school buildings. That order still remains in effect and the Court has enforced it and intends to do so as the Court's attached letter marked Appendix J attached hereto indicates.

ARGUMENT

REASONS WHY THE MOTION TO DISMISS APPEAL SHOULD BE DENIED

INTRODUCTION

This Court has jurisdiction over the Appeal of Board of Education from the Order of November 5, 1971 either as a final decision under 28 U.S.C. 1291; as the term "final decision" has been interpreted by the United States Supreme Court, by the Court of Appeals for the Sixth Circuit and by other Circuits; 28 U.S.C. 1291 reads in part:

"The Courts of Appeals shall have jurisdiction of

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[1] As to this confirmation, the Court's attention is directed to the Trial Court's language at the outset of its order of November 5, 1971: "The Court having entered its findings of fact and conclusions of law on the issue of segregation on September 27, 1971."

appeals from all final decisions of the district courts of the United States . . . "

If this Court does not deem the Order to be a "final decision" within the meaning of §1291, then the only possible alternative interpretation is that the Order is interlocutory and in the nature of an injunction from which appeals are permitted pursuant to 28 U.S.C. 1292(a) (1):

"(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;"

I.

THE ORDER OF NOVEMBER 5, 1971 IS A FINAL DECISION WITHIN THE MEANING OF 28 U.S.C. 1291 AS THE TERM "FINAL DECISION" HAS BEEN INTERPRETED BY THE UNITED STATES SUPREME COURT, 6TH CIRCUIT AND OTHER CIRCUITS.

It is ineluctable fact that none of the issues of fact or law raised in Plaintiffs' complaint or Defendants' answer remain before the Trial Court. All were disposed of by the "Ruling on Issue of Segregation" of September 27, 1971, and the subsequent order incorporating that Ruling on November 5, 1971. All that remains is to fashion a remedy.

These facts, by clear logic and ample precedent, allow only the conclusion that the above Ruling constitutes a "final decision" within the meaning of §1291, which is appealable at this time.

With regard to precedent, there is more significance to the cases Plaintiffs fail to cite than those they do cite.

Plaintiffs' sole reliance for all practical purposes is on **Taylor v. Board of Education**, 288 F. 2d 600 (2d Cir. 1961) in which the second circuit did hold that an order finding the existence of **de jure** segregation and mandating the school board to submit a desegregation plan was not appealable either as a final order, or as an interlocutory injunction within the meaning of 28 U.S.C. 1292(a) (1). The **Taylor** decision is distinguishable from the case at Bar, is not the law of the Sixth Circuit, has not been followed on this point by any other Circuit, and most importantly, preceded by approximately 14 months the decision of the United States Supreme Court of June 26, 1969 in **Brown Shoe Company v. United States**, 370 U.S. 294, in which the Supreme Court held that an appeal from an order analagous to the order in the case at Bar must be interpreted as a final appealable order.

There has been indication that the Second Circuit's position on this point is not broadly accepted for some time. The late Mr. Justice Jackson, in reversing another decision of the Second Circuit which had denied appealability on the grounds of lack of finality, indicated as much:

> "The only issue presented by this case turns on the finality of a judgment for purposes of appeal, a subject on which the volume of judicial writing already is formidable. The Court of Appeals resolved against finality of the decree in question, saying, however, that it did so against the unanimous conviction of the court as constituted but

> in deference to a precedent established by a differently constituted court of the same Circuit, 173 F. 2d 738. Because of this intracircuit conflict, we made a limited grant of certiorari. 338 U.S. 811. That we cannot devise a form of words that will settle this recurrent problem seems certain; but in this case we agree with the convictions of the court below and reverse its judgment." **Dickinson v. Petroleum Corporate Conversion Corporation**, 338 U.S. 507, at 508 (1950).

Thus, the Second Circuit itself has long been split on the question of finality, and the Supreme Court, long ago, became dubious of the Second Circuit's views on finality. This alone is good reason for this Court not to blindly follow the decision of a split Second Circuit panel in **Taylor.**

There is a factual distinction between **Taylor** and the case at Bar. As a practical matter, the order in **Taylor** involved, basically, desegregating one school in a suburban district. Here we are speaking of an entire school system, reputedly the fourth largest school district in terms of student enrollment in the United States. Unlike **Taylor**, leaving the rights of the parties undetermined now at the appellate level could result in a great disservice to over 290,000 school children.

Much more on point than the dubious **Taylor** case is the more recent pronouncement of the United States Supreme Court in **Brown Shoe Company v. United States**, 370 U.S. 294 (1969) which dictates that the November 5, 1971 order be interpreted as a final appealable decision.

Brown Shoe Company resulted from a complaint brought by the United States government alleging that the merger of Brown Shoe Company and Kinney Shoe Company was in violation of Section 15 of the Clayton Anti-Trust Act (15 U.S.C. 25). The District Court held that the Brown-Kinney merger did indeed

violate Section 15 and entered a judgment so concluding, but reserved ruling on divestiture until the filing of divestiture plans for doing so. The case reached the United States Supreme Court by direct appeal pursuant to the so-called Expediting Act, 15 U.S.C.A. Section 29, which permitted direct appeals in the event of "final judgment of the district court."

In holding that the judgment of the District Court could be interpreted as final, even though no plan for divestiture had been entered, the United States Supreme Court, speaking through Mr. Chief Justice Warren, said, beginning at 308:

> "(5) We think the decree of the District Court in this case had sufficient indicia of finality for us to hold that the judgment is properly appealable at this time. We note, first, that the **District Court disposed of the entire complaint filed by the Government. Every prayer for relief was passed** upon. Full divestiture by Brown of Kinney's stock and assets was expressly required. Appellant was permanently enjoined from acquiring or having any further interest in the business, stock or assets of the other defendant in the suit. **The single provision of the judgment by which its finality may be questioned is the one requiring appellant to propose in the immediate future a plan for carrying into effect the court's order of divestiture.** However, when we reach the merits of, and affirm, the judgment below, the sole remaining task for the District Court will be its acceptance of a plan for full divestiture, and the supervision of the plan so accepted. Further rulings of the District Court in administering its decree, facilitated by the fact that the defendants below have been required to maintain separate books **pendente lite**, are sufficiently independent of, and subordinate to, the issues presented by this appeal to make the case

in its present posture a proper one for review now. Appellant here does not attack the full divestiture ordered by the District Court as such; it is appellant's contention that under the facts of the case, as alleged and proved by the Government no order of divestiture could have been proper. **The propriety of divestiture was considered below and is disputed here on an 'all or nothing' basis. It is ripe for review now, and will, thereafter, be foreclosed.**

Repetitive judicial consideration of the same question in a single suit will not occur here. (Citations Omitted)

A second consideration supporting our view is the character of the decree still to be entered in this suit. **It will be an order of full divestiture. Such an order requires careful, and often extended, negotiation and formulation. This process does not take place in a vacuum,** but rather, in a changing market place, in which buyers and bankers must be found to accomplish the order of forced sale. The unsettling influence of uncertainty as to the affirmance of the initial, underlying decision compelling divestiture would only make still more difficult the task of assuring expeditious enforcement of the anti-trust laws. **The delay in withholding review of any of the issues in the case until the details of a divestiture had been approved by the District Court and reviewed here could well mean a change in market conditions sufficiently pronounced to render impractical or otherwise unenforceable the very plan of asset disposition for which the litigation was held. The public interest, as well as that of**

the parties, would lose by such procedure."
(emphasis added)

The analogy of **Brown Shoe Company** on the point of issue here to the case at Bar is clear. That **Brown** dealt with anti-trust law does not change the fact that it represents the true state of the law on this issue.

This becomes evident by noting the emphasized portions of the above quotation and comparing them to the facts in the instant case. Taken together, the September 27, 1971 Ruling and Order of November 5, 1971 answered, as in **Brown**, "every prayer for relief". The Plaintiffs did not prevail on the issue of segregation among faculty and administration. They prevailed on all other issues. As in the **Brown** case, the only matter left is the implementation and supervision of a remedy in accordance with the Trial Court's final conclusion on the issue of segregation. As in the **Brown** case, if this Court of Appeals affirms on the merits "the sole remaining task for the District Court will be its acceptance of a plan for a full divestiture, and the supervision of the plan so accepted". Here it will be the acceptance and supervision of a desegregation plan.

On the other hand, if this Court finds on appeal that the Trial Court erred in its Ruling on the Issue of Segregation, then there will be no need for a remedy.

As was the appellant in **Brown**, the Board of Education is in an "all or nothing" position. The School Board's position is that there should be no order of desegregation just as the appellant in **Brown** claimed there should be "no order of divestiture".

As in **Brown**, there will be no "repetitive judicial consideration" before this Court once this Court decides the basic segregation issue here which Defendants' appeal raises.

Just as Mr. Chief Justice Warren in **Brown** recognized that a divestiture order is a complicated order demanding time and consideration because of market conditions, likewise a desegregation order by its very nature is complex, not necessarily because of market conditions, but because of sociological, economic and changing population patterns which do require time. As in **Brown**, a delay here in withholding review will be contrary to the public's interest. If this Court finds no basis for remedy, then further action on remedy implementation is futile. If this Court finds that there is a basis for remedy, it will have established a firm footing for a remedy.

The Trial Court below seemed to merge the concept of **de facto** segregation with **de jure** segregation. The law of the Sixth Circuit is that a school board is not responsible for **de facto** segregation. **Deal v. Cincinnati Board of Education**, 419 F. 2d 1387 (1969). There is also recent indication that the United States Supreme Court recognizes that the Boards of Education are not responsible for **de facto** segregation. See the Court's summary order in **Spencer v. Kugler**, 40 L.W. 3329 (January 18, 1972).

We recognize that the Trial Court attempted to charge the Board of Education with **de jure** segregation, but this attempt was based on three isolated findings. One suggesting that the Board had in one instance bussed black pupils past a white school was not supported on the record for the bussing to the school involved was for physical facility reasons (newer school) rather than due to any attempt to segregate. The second finding concerned the Board's previous optional attendance zones, which the Trial Court itself found the Board had actively sought to eliminate, even hiring an expert to do so. (See page 13 – Ruling) The third isolated finding was a suggestion that in "at least one instance" the Board did build a school "which contains black students". We suggest that this is indeed an isolated instance in a school system of over three hundred school buildings with over 295,000 school children.

On the other hand, contrary to any other court decision in which a school board has been charged with **de jure** segregation, the Trial Court here, in effect, awarded the Board a **summa cum laude** degree in its efforts to advance integration. From page 18 through page 24 of its Ruling, the Trial Court spends considerable time setting forth the tremendous efforts which the School Board has expended in an effort to integrate. In fact, the Court begins its entire discussion at page 18 by the following words:

> "It would be unfair for us not to recognize the many fine steps the Board has taken to advance the cause of quality education for all in terms of racial integration and human relations. The most obvious of these is in the field of faculty integration."

The issue then is clearly drawn. Do isolated instances which the Trial Court has properly or improperly found to be discriminatory form a basis for a finding of **de jure** student segregation sufficient to support a comprehensive remedy when cast against the Trial Court's findings that the School Board has labored mightily to remove **de facto** segregation? This crucial issue, if decided in the School Board's favor, would be wholly dispositive of the case. If decided adversely to the School Board, it would not be susceptible to reargument in the hearings on proposed remedies. In either event, it is ripe for decision **now.**

The key, of course, is the practical interpretation of the word "final". The Court of Appeals for the Sixth Circuit has traditionally followed an enlightened view in interpreting the term "finality" in permitting appeals. Thus, in **Gillespie v. United Steel Corporation,** 321 F. 2d 518 (1963), this Court held that a motion striking all references to the statute of the State of Ohio, to unseaworthiness, or references to recovery

for the benefit of brothers and sisters of the decedent in an action for recovery under the Jones Act was an appealable final order.

In upholding the Sixth Circuit on the issue of finality, the United States Supreme Court in **Gillespie v. United States Steel Corporation**, 379 U.S. 148 at 150 said:

> "Under Section 1291 an appeal may be taken from any 'final order of a district court'. But as this court often has pointed out, a decision 'final' within the meaning of Section 1291 does not necessarily mean the last order possible to be made in a case . . .
>
> And our cases long have recognized that whether a ruling is 'final' within the meaning of Section 1291 is frequently so close a question that decision of that issue may either be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within might well be called the twilight zone of finality".

In a school segregation case, this Court in a short order denied a motion to dismiss an appeal from an order similar to the order here, **Board of Education of the City of Chattanooga v. Mapp** (filed January 20, 1961).

We appreciate that in **Taylor** the Circuit Court criticized this Court's decision in **Mapp**. But then again **Taylor** was before **Brown**. We also point out to the Court that although **Taylor** was called to the Fifth Circuit's attention, the Fifth Circuit went on to ignore **Taylor** and held that the ordering of a desegregation plan dealing expressly with prohibited acts amounted to a mandatory injunction and was appealable. The **Board of Public Instruction of Duval County v. Braxton**, 326

F. 2d 616, 619 (5th Cir. 1964).

The Sixth Circuit has been true to the philosophy of **Gillespie** as subsequently expressed in **Brown** in permitting appeals of final orders such as this including those in school segregation case. We invite the Court's attention to its decision in **Kelley v. Metropolitan Board of Education**, 436 F. 2d 856, 862 (6th Cir. 1970) where the Court upheld the appealability of an order saying "pupil integration proceedings for an indefinite time is appealable as a final order under 28 U.S.C. 1291."

Obviously in **Kelley**, the Court believed that the matter should be reviewed by the appellate court because of its importance to the parties involved. A similar view was taken by the Tenth Circuit in **Board of Education of Oklahoma City v. Dowell**, 375 F. 2d 158 (10th Cir. 1967) where that Court did not even question its jurisdiction in reviewing an order requiring a local board to submit a plan with certain specified features.

The practical approach in a case such as the case at Bar is to permit the appeals by recognizing that the November 5, 1971 order incorporated the September 27, 1971 ruling as a final appealable order. All the parties are entitled to know whether or not the lower court was correct in its decision just as the Plaintiff was permitted to find out even before trial whether Public Act 48 was constitutional, **Bradley v. Milliken**, 443 F.2d 897 (1970), and whether the Trial Court abused its discretion in not implementing the so-called April 7, 1970 plan. **Bradley v. Milliken**, 438 F. 2d 945 (6th Cir. 1971). The only difference now is that the order is final and it is Defendants seeking review.

It should be noted that the Plaintiffs-Appellees have also filed an appeal challenging the ruling of the Trial Court as to

faculty desegregation. If this Court of Appeals finds that Defendants' Board of Education appeal cannot be interpreted as a final order, the Court still is saddled with Plaintiffs' appeal. Since the ruling on that issue denied relief, it is as final a decision as is going to be made. There would be no logic to hearing only that portion of the case now. Thus, it becomes imperative in the interest of judicial economy that all appeals be heard at this time.

We suggest to the Court that the rights of students are just as important as the right of corporations which were involved in the **Brown** case and for this reason, these appeals should be heard by this Honorable Court at this time.

II.

EVEN IF THIS COURT DECIDES THAT THE ORDER IS NOT A FINAL ORDER, IT IS STILL APPEALABLE TO THIS COURT AS THE COURT HAS JURISDICTION UNDER 28 U.S.C. 1292 BECAUSE IT HAS THE EFFECT OF AN INJUNCTION.

If this Court should interpret the order of November 5, 1971 as not a final order that can be appealed under 28 U.S.C. 1291, it is the position of Defendants' Board of Education that the order entered by the District Court on November 5, 1971, is appealable to the United States Court of Appeals for the Sixth Circuit as a matter of right under 28 U.S.C. §1292(a) (1).

This statute is the direct descendant of the Evarts Act of 1891, 26 Stat. 828, which was designed to facilitate the appeals of certain interlocutory orders. The relevant portion of the statute, as currently in force, reads as follows:

"(a) The courts of appeals shall have jurisdiction of appeals from:

> (1) Interlocutory orders of the district courts of the United States, . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court; . . . "

28 U.S.C. §1292 (a) (1).

As interpreted by the courts and academic commentators, §1292 does not necessarily allow appeals of all orders which are labeled injunctions, nor does it preclude appeal of orders which are not labeled injunctions. Here, as elsewhere in the law, substance rules over form. The consensus of the judicial and academic authorities seems to be that §1292 permits appeals from the granting or denying of injunctive relief when that relief goes to the heart of the case, and is not merely incidental to the trial.

It is clear that the order which Defendant Board of Education is challenging gives some or all of the substantive relief sought by a complaint. In fact, it is not too much to say that the order goes to the heart of the case. The District Court, after finding against Defendants' Board of Education on the issue of **de jure** segregation, issued this order requiring the submission of a plan for desegregating the Detroit schools. The plan ordered is directed precisely to the ultimate relief sought by Plaintiffs.

Of course, the fact that the November 5, 1971 order was not stated in terms of prohibition does not affect the fact that it is an injunction. Mere labels are not decisive in determining whether an order is an "injunction" under §1292 (a) (1), and it is clear that mere words of prohibition are not an essential element of an injunction. In effect, Defendants' Board of Education has been prohibited, with all the sanctions available to the District Court, from **not** submitting a plan. Furthermore, the

Trial Court has enjoined the Board from engaging in any school construction and this injunction must be interpreted as part of the November 5, 1971 order.

Thus Courts of Appeals, in other cases involving the desegregation of schools, have recognized appealability of orders under §1292 (a) (1). For example, the Fifth Circuit concluded "that the ordering of a plan dealing expressly with these prohibited acts amounts to a mandatory injunction." **Board of Public Instruction of Duval County v. Braxton**, 326 F. 2d 616, 619 (5th Cir. 1964). The Fifth Circuit has also upheld the appealability under §1292 (a) (1) of an order "denying the plaintiff's motion to modify the plan." **Steele v. Board of Public Instruction of Leon County,** 371 F. 2d 395, 396 (5th Cir. 1967). See also **Board of Education of Oklahoma City v. Dowell**, 375 F. 2d 158 (10th Cir. 1967), where the Court did not even discuss the question of its jurisdiction to review a District Court order requiring a local board to submit a plan with certain specified features.

In all of these cases, the District Court's order was held appealable under §1292 (a) (1). In none of them was the order stated in prohibitory terms. In each case, the order concerned the preparation of a desegration plan, and the Courts of Appeals considered and decided the issues presented on appeal.

Following the lead of the Fifth Circuit and the Tenth Circuit, there is absolutely no reason why this Court of Appeals could, in the alternative, interpret the order of November 5, 1971 as appealable under Section 1292 (a) (1) as it is in the nature of an injunction. More importantly, the issue of segregation is now ripe for review.

CONCLUSION

Based upon the reasons set forth above, there is no question that the order of November 5, 1971 was properly appealed to this Court and this Court has jurisdiction in the matter as it was either a final decision within the meaning of 20 U.S.C. 1291 or an interlocutory appealable order within the meaning of 28 U.S.C. 1292 (a) (1).

Respectfully submitted,

RILEY AND ROUMELL

By: GEORGE T. ROUMELL, JR. /s/
George T. Roumell, Jr.
Attorneys for Defendants
Board of Education for the
City of Detroit, et al

Dated: February 3, 1972

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
BAY CITY, MICHIGAN 48708

Chambers of
Stephen J. Roth
District Judge

January 25, 1972

Mr. Louis D. Beer
Riley and Roumell
7th Floor Ford Building
Detroit, Michigan 48226

RE: Civil Action No. 35257,
Bradley v. Milliken,
et al.

Dear Mr. Beer:

I have read your letter of January 20th respecting proposed modifications of the "construction" injunction of the court in the above entitled matter. I consider it better practice in such matters to make a motion for the amendment of the injunction. I suggest that a motion be brought for that purpose and that the matter be noticed for the morning of February 10, 1972, at any time convenient to counsel. If there is no opposition, as seems to be the present indication, you or someone from your office, may simply appear and present the necessary orders for my signature.

Very truly yours,

Stephen J. Roth

SJR:bjg

XC: All counsel of record:
Mr. Lucas
Mr. Ritchie
Mr. Sachs
Mr. Krasicky